

STATE OF MICHIGAN
COURT OF APPEALS

WAYNE COUNTY,

Respondent-Appellee/Cross-
Appellant,

v

ROBERT J. SKRZYPCZAK, JR.,

Charging Party-Appellant/Cross-
Appellee.

UNPUBLISHED
December 21, 2010

No. 292430
MERC
LC No. 07-000092

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Charging party Robert J. Skrzypczak, Jr., proceeding in propria persona, appeals as of right from a decision of the Michigan Employment Relations Commission (“MERC”), which upheld a hearing referee’s determination that respondent Wayne County lawfully terminated Skrzypczak’s employment with the county for reasons unrelated to Skrzypczak’s involvement in protected activity under the Public Employment Relations Act (PERA), MCL 423.201 *et seq.* Wayne County cross appeals the MERC’s decision to the extent that it modified the hearing referee’s decision by finding that Wayne County did violate the PERA by instructing Skrzypczak not to have further contact with Local 409. We affirm the MERC’s determination that Skrzypczak was lawfully terminated from his employment, but reverse its decision holding that Wayne County violated the PERA.

Skrzypczak was employed by Wayne County as a safety engineer. In late 2005, or early 2006, he was assigned to work at the Wayne County Juvenile Detention Facility to statistically analyze an increase in assaults by residents against staff in an effort to resolve that issue. Skrzypczak made several recommendations for changes in restraint procedures, but was told that those recommendations could not be implemented because of various limitations or restrictions that were applicable to the county’s juvenile facility. Skrzypczak continued to push for policy changes at the facility, during the course of which he had conversations about safety issues with representatives of Local 409, the union that represented employees at the facility,¹ and also

¹ Skrzypczak was not represented by that union.

shared with those representatives information regarding the rates of assaults by residents against staff. Skrzypczak's activities created tension with staff and management personnel at the facility who believed that he was overstepping his authority. Skrzypczak was eventually removed from his assignment at the facility, and then later was terminated from his employment with the county.

Skrzypczak subsequently brought charges of unfair labor practices against Wayne County, alleging that he was terminated from his employment for engaging in protected activity under the PERA. Wayne County maintained that Skrzypczak was terminated from his position because of unsatisfactory work performance, offensive behavior, insubordination, and because he was otherwise unable to perform his job as a safety engineer because he had lost his driver's license and had a felony criminal record. The MERC agreed that Skrzypczak was terminated for reasons unrelated to his involvement in protected activity, but also found that Wayne County violated the PERA when it instructed Skrzypczak not to have further contact with Local 409. This appeal followed.

In *Oak Park Pub Safety Officers Ass'n v City of Oak Park*, 277 Mich App 317, 323-324; 745 NW2d 527 (2007), this Court set forth the applicable standards to apply when reviewing a MERC decision:

MERC's decisions are reviewed on appeal pursuant to Const 1963, art 6, § 28 and MCL 423.216(e). *Grandville Muni Executive Ass'n v Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). Accordingly, MERC's findings of fact are conclusive if supported by competent, material, and substantial evidence on the whole record. *Id.*; *Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541, 552; 517 NW2d 240 (1994). MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. *Grandville Muni Executive Ass'n, supra* at 436. [*Oak Park Pub Safety Officers Ass'n v City of Oak Park*, 277 Mich App 317, 323-324; 745 NW2d 527 (2007).]

Initially, we note that Skrzypczak raises several issues in his pro se brief that have no relevance to this appeal. For example, he argues that Wayne County violated the terms of a collective bargaining agreement and that it may also be held liable for breach of contract, defamation, libel, invasion of privacy, and violation of the Whistleblower's Protection Act, MCL 15.361 *et seq.* He also argues that he should be permitted to raise these claims before a jury, and that counsel should be appointed to assist him in pursuing these claims. This appeal is limited to review of the MERC's decision. Any issues unrelated to review of the MERC's decision are beyond the scope of this appeal and are not properly before this Court. Accordingly, they shall not be considered.

Section § 9 of the PERA, MCL 423.209, recognizes a public employee's right to organize and join labor organizations for purposes of collective bargaining or other mutual benefit. The statute provides:

It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and

protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

Section 10 of the PERA, MCL 423.210, prohibits employers from interfering with the rights granted to employees under § 9. Section 10 provides, in pertinent part:

(1) It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9; . . . (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization

In this case, Skrzypczak claimed that he was terminated from his employment in retaliation for engaging in protected activity, contrary to § 10(1) of the PERA. Conversely, Wayne County argued that he was terminated for lawful reasons unrelated to his protected activity. In *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America, UAW-Technical Office, Prof Dep't v City of Sterling Hts*, 176 Mich App 123, 128-129; 439 NW2d 310 (1989), this Court identified the framework for evaluating such a claim:

“[W]here it is alleged that a discharge is motivated by antiunion animus the burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor in the decision of the employer to discharge the employee. Once this showing is established, the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The burden of the employer is one of going forward to meet the prima facie case established by the employee. It is not a burden of persuasion on the ultimate issue of the existence or nonexistence of a violation. It is a balancing of the evidence. If the employer, by credible evidence, balances the employee’s prima facie case, the employer’s burden of proof is met and the duty of producing further evidence shifts back to the employee. The burden of the employer referred to is a burden of production of evidence to meet the prima facie case of the employee. If the burden of the employer is met, the burden is then once again on the employee.” [Footnote omitted.]

However, as this Court observed in *Michigan Ed Support Personnel Ass’n v Evart Pub Sch*, 125 Mich App 71, 74; 336 NW2d 235 (1983), “burdens of ‘persuasion’ and ‘production’ are not, as a practical matter, likely to be very important in most cases as decisions will usually turn on a weighing of the evidence.” This observation is particularly fitting in this case, in which the parties offered contrasting testimony concerning the reasons for Skrzypczak’s termination. On appeal, this Court must accept the MERC’s factual findings if those findings are supported by competent, material, and substantial evidence on the whole record. See *St Clair Intermediate Sch Dist v Intermediate Ed Ass’n/Michigan Ed Ass’n*, 458 Mich 540, 553; 581 NW2d 707 (1998), and *Detroit v Detroit Fire Fighters Ass’n Local 344, IAFF*, 204 Mich App 541, 554-555; 517 NW2d 240 (1994).

In this case, it was undisputed that Skrzypczak lost his driver’s license, which substantially limited the number of job assignments that Skrzypczak could perform as a safety engineer. The evidence showed that Wayne County was willing to accommodate Skrzypczak

because it was led to believe that the situation was only temporary. Therefore, it agreed to assign him to nearby locations where he could walk to his work assignments. He was initially assigned to work at the Wayne County Jail, but then was no longer able to work there because he was denied access due to his criminal record. Although Skrzypczak contends that his records wrongfully indicate that he has a felony conviction, that testimony at the hearing was undisputed. Regardless, it was not contested that Skrzypczak was denied access to the jail because of his criminal record.

Skrzypczak was thereafter assigned to the Juvenile Detention Facility. The evidence showed that during this assignment, Skrzypczak became increasingly vocal about the facility's refusal to adopt his recommendations for addressing the assault issue. In the fall of 2006, Skrzypczak's supervisors received complaints about his increasingly loud and abrasive conduct at committee meetings. Thereafter, he began openly questioning management decisions at the facility, and became critical of the facility's policies despite his lack of knowledge and expertise in the subject area. In December 2006, he informed the department administrator at the facility that he intended to continue his campaign until his demands for operational changes were acted upon, and he referred to the administrator as "foolish." Skrzypczak's conduct prompted additional complaints to his supervisors, who shortly thereafter removed him from his assignment at the Juvenile Detention Facility.

The MERC credited Skrzypczak's testimony that, during his assignment at the Juvenile Detention Facility, he was told by his supervisor to stop discussing the assault issue with Local 409. However, the MERC found that Skrzypczak's inappropriate and unprofessional conduct in questioning the motives and intelligence of the facility's administrators interfered with his ability to perform his assignment at the facility to justify his removal from that assignment notwithstanding his participation in any protected activity. Because there is competent, material, and substantial evidence to support the MERC's finding that Skrzypczak was removed from his job assignment at the Juvenile Detention Facility for reasons unrelated to his participation in protected activity, we must defer to that finding.

After Skrzypczak was removed from the Juvenile Detention Facility assignment, his work options were limited due to the loss of his driver's license and his ineligibility to work at the county jail. Therefore, he was assigned various clerical tasks. The evidence showed that he openly complained about the work he was assigned and refused to perform certain tasks.

The MERC hearing referee concluded:

[B]y March 2007, Skrzypczak had been without a driver's license, a normal requirement of his job, for about twenty-five of his thirty-two months of employment as a safety officer. He could not regain this license for another year. Moreover, he could not work at the JDF because Watson and Stanley had complained about him, the Jail because his security clearance had been revoked, or the road maintenance yards because he could not drive to these locations. Thus, Skrzypczak could not work at any of the locations where most of the safety engineers' work is performed, or any of the smaller locations to which he would have to drive. Skrzypczak also was not willing to do the clerical duties which Saab tried to assign him in lieu of safety officer work. In sum, in March 2007, Skrzypczak was unable to do his fair share of the work, would not be able to do so

for at least another year, and had been argumentative when assigned to do non-safety work. I conclude, based on the evidence as a whole, that Respondent had a lawful reason for terminating Skrzypczak in March 2007 and that it would have done so in the absence of Skrzypczak's protected activities.

The MERC's factual findings are supported by competent, material, and substantial evidence on the whole record and support the MERC's determination that Skrzypczak would have been terminated from his employment even in the absence of his participation in protected activity. Accordingly, we affirm the MERC's dismissal of Skrzypczak's unfair labor practice charge related to his termination.

In its cross appeal, Wayne County argues that the MERC erred in ruling that Wayne County violated § 10(1)(a) when Skrzypczak's supervisors instructed him not to have any further contact with the union at the Juvenile Detention Facility. We agree.

Initially, we agree that the MERC's factual finding that Skrzypczak's supervisors instructed him not to have further contact with the union is supported by competent, material, and substantial evidence on the whole record and, therefore, must be affirmed. See *St Clair Intermediate Sch Dist*, 458 Mich at 553, and *Detroit Fire Fighters Ass'n Local 344*, 204 Mich App at 554-555. Nonetheless, we agree with Wayne County that the MERC failed to analyze that instruction within the appropriate legal framework.

In *Ingham Co v Capitol City Lodge No 141 of the Fraternal Order of Police, Labor Program, Inc*, 275 Mich App 133, 141-142; 739 NW2d 95 (2007), this Court stated:

To analyze whether an employer can lawfully apply an employment rule to discipline an employee for engaging in what would otherwise be a protected activity under § 9 of PERA, we apply a three-part test. Under the first prong of the test, we look at whether the employer's action adversely affected the employee's protected right to engage in lawful concerted activities under PERA. Under the second prong, we look at whether the employer has met its burden to demonstrate a legitimate and substantial business justification for instituting and applying the rule. Finally, under the third prong, we balance the diminution of the employee's rights because of application of the rule against the employer's interests that are protected by the rule. In addressing this final prong, we must remain cognizant that "[it] is the primary responsibility of the [National Labor Relations] Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" [Footnotes omitted.]

In this case, we must first determine whether Skrzypczak's contact with union representatives at the Juvenile Detention Facility was a protected activity under § 9 of the PERA. As explained in *Ingham Co*, 275 Mich App at 143-144:

"As a general proposition PERA does not proscribe breach of a collective bargaining agreement or 'unfairness'; an employee may be terminated for a 'good reason, bad reason, or no reason at all.' But an employee may not be discharged for exercising rights guaranteed by § 9 of the act." As mentioned, § 9 permits

public employees “to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection. . . .” According to the United States Court of Appeals for the Third Circuit, to qualify as a protected activity, “it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.” Further, the Michigan Supreme Court has explained that “[a]n employee may, in connection with the prosecution of a good faith grievance, employ reasonable, nonabusive, methods of obtaining information necessary to prosecute the grievance.” [Footnotes omitted.]

This Court further explained that not all union activity is protected activity:

The union also contends that, simply because Detective Siegrist was acting as a union representative, her activities fell under the protection of PERA. According to this Court, however, “[m]isconduct in the course of concerted activity . . . is not beyond an employer’s right to discipline.” This Court explained: ““When a union steward is disciplined for violating job rules and not because of his position as a union official, the steward cannot look to his union status for protection.”” Further, in *Texas Instruments, supra*, the United States Court of Appeals for the First Circuit stated that employees who act under § 7 of the NLRA are not always shielded from discipline when they violate an employer’s internal rules. “For example, concerted activity that violates state or federal law, that irresponsibly exposes an employer’s property to possible damage or that constitutes insubordination or disloyalty may be found to fall outside the scope of the NLRA even if undertaken in the interest of self-organization or collective bargaining.” The First Circuit stated that “employees are entitled to use for self-organizational purposes information and knowledge which comes to their attention in the normal course of work activity and association but are not entitled to their Employer’s private or confidential records.” [*Id.* at 146-147 (footnotes omitted).]

See also *AFSCME, Mich Council, Local 574-A v City of Troy*, 185 Mich App 739, 744-745; 462 NW2d 847 (1990) (union representatives may be disciplined for violating job rules, interfering with management, or insubordination, and they cannot always look to their union status for protection in those situations).

The first prong of the test was satisfied because Skrzypczak testified that he was helping members of the union that represented workers at the Juvenile Detention Facility to prepare a grievance related to safety issues at that facility. Because § 9 protects employees when engaging in lawful concerted activities for the purpose of collective bargaining or negotiation or other mutual aid and protection, Skrzypczak was protected because he was offering his assistance to a union that represented employees. *Ingham Co*, 275 Mich App at 144-145.

For the second prong, we must determine if there was a business justification for Wayne County’s action in instructing Skrzypczak not to have further contact with the union at the Juvenile Detention Facility. We believe that the MERC’s findings demonstrate that there were business justifications for Wayne County’s decision to instruct Skrzypczak to end all contact

with the union. Skrzypczak had been replaced as the safety unit's engineer assigned to the Juvenile Detention Facility because of his behavior toward staff at the facility and his inability to civilly work with officials there. Further, regardless of Skrzypczak's good intentions, his previous recommendations had been rejected on their merits.

Once Wayne County justifiably removed Skrzypczak from working with the Juvenile Detention Facility for performance-related reasons, it had a legitimate business reason to instruct him not to meet with the union that represented employees at that facility, because he was no longer authorized to represent the safety unit on matters related to that facility. Accordingly, Wayne County met its burden of proving that it had a legitimate and substantial business justification for barring Skrzypczak from meeting with employees or staff at the Juvenile Detention Facility, even if that contact related to protected union activity. *Ingham Co*, 275 Mich App at 141-142,

For the third prong, we also conclude that the MERC erred in finding that Wayne County violated the PERA. Even if Skrzypczak was trying to help the union at the Juvenile Detention Facility prepare a grievance to address the assault problem there, and therefore intended to engage in protected union activity to offer mutual aid to that union, Skrzypczak was acting in his capacity as a member of the Safety Unit. He was not acting in pursuit of his own individual union interests, nor did he belong to that union. More importantly, there was no evidence that Skrzypczak was providing any actual assistance to the union. Skrzypczak's suggestions and ideas for improving safety had been rejected on their merits and there was no evidence that the union welcomed or sought his assistance. Thus, the third prong weighs in favor of Wayne County's actions. Skrzypczak was not acting to protect his own interests, or to help protect the collective bargaining or negotiating rights of union members who worked at the Juvenile Detention Facility. Accordingly, Wayne County's decision to limit Skrzypczak's further contact with union representatives at the Juvenile Detention Facility involved the lawful application of an employment rule and did not violate the PERA.

We agree with Wayne County that the MERC erred in relying on *Midland Co Rd Comm v United Steel Workers Local 12075*, 21 MPER 42 (2008); 2008 MPER (LRP) LEXIS 38, and similar cases to conclude that Wayne County violated the PERA. Those cases involve the disciplining of employees for misconduct or other inappropriate behavior that occurred while the employee was directly engaged in protected activity. The challenged conduct in this case occurred as part of the ordinary work relationship. Accordingly, this case is controlled by the test in *Ingham Co*, 275 Mich App at 141-142. Because application of that test to the MERC's findings reveals that Wayne County did not violate the PERA, we reverse that portion of the MERC's decision.

Affirmed in part and reversed in part.

/s/ William C. Whitbeck
/s/ Brian K. Zahra